



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KEBEDE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Sandra Baffoe-Bonnie, ECA

Winrose Njuguna, ECA

INTRODUCTION

1. On 22 March 2017, the Applicant, a staff member of the United Nations Economic Commission for Africa (“ECA”), filed a claim challenging the decision to deny his request for medical evacuation and medical treatment.

THE CLAIM

2. Under section V of his application, the Applicant describes the contested decision as the denial of medical evacuation and medical treatment in accordance with a mediation agreement reached through the auspices of the United Nations Ombudsman and in accordance with the United Nations Convention on the rights of disabled persons in breach of the Staff Rules.

3. The Application was not accompanied by a copy of the mediation agreement referred to and the particulars provided by the Applicant related almost entirely to his complaint that his request for medical evacuation had been refused. The only other reference to the mediation agreement was in relation to the remedy he was seeking to the effect that the Tribunal should grant an order enforcing the terms of the agreement. The Applicant purported to attach at appendix 6 of his application, the mediation agreement bearing the date 6 August 2010.

4. The Application indicates that the decision being challenged was made on several occasions in the past with the last decision being made and communicated to him on 12 January 2017. In considering this matter the Tribunal would wish to take into account what precisely were the decisions that were taken prior to 12 January 2017.

5. The Applicant’s particular concern is the fact that he contracted polio as a child as a result of which there was deformity to his right lower limb accompanied by muscle weakness. The Applicant’s principal contention is that, as a disabled person, he has a right to equal medical treatment and is entitled to medical evacuation if the medical treatment in question could not properly be provided at his duty station.

THE REPLY

6. In his reply dated 22 April 2017, the Respondent accepts that the Applicant is disabled and is entitled to the benefit of whatever provisions are available to staff members and there is no challenge to the argument that the Applicant's special circumstances relating to disability have properly to be taken into consideration. Whilst submitting that the claim is not receivable the Respondent has provided details of the medical assistance, including medical evacuation, rendered to the Applicant over several years.

7. The Respondent referred to a previous application, Case No. UNDT/NBI/2016/077, in which the Applicant included a complaint of denial of medical evacuation and the Respondent's reply that this aspect of his claim was not receivable because he had not submitted a request for management evaluation. It is the Respondent's belief that this submission caused the Applicant to renew his requests for medical evacuation to remedy the defect in his pleadings. The Respondent further submitted that this claim was in breach of a written undertaking given in December 2013 in which he agreed that he would not request further medical evacuations. The Tribunal does not consider it necessary to address this argument, in view of the finding that the initial decision to refuse further medical evacuations was notified to the Applicant on 15 July 2014. If appropriate this matter may be the subject of comment in the Judgment in Case No. UNDT/NBI/2016/077.

8. The Respondent's primary submission is that this application is clearly a ruse in an attempt to cure the defect in the previous case wherein it was submitted that the claim of denial of medical evacuation was not subjected to management evaluation. It was submitted that the claim was not receivable *ratione temporis* because it was not filed within requisite deadlines under staff rule 11.2(c) since the decision that he was not eligible for medical evacuation was notified to him on 15 July 2014. Since then he repeated the requests on several occasions and had been refused. The Respondent submitted that the Applicant was trying to reset the clock in an attempt to render his application receivable.

9. The Respondent filed a motion for consolidation of the current case with Case No. UNDT/NBI/2016/077 (Kebede).

FINDINGS OF FACT

10. The Applicant joined ECA in 1994 as a Library Clerk at the G-3 level. He has been working as an Inventory Control and Supply Assistant in the Property Management Unit since 14 March 2007.

11. The record shows that the Applicant was provided with medical evacuations by ECA, with special approval from the Medical Services Division (“MSD”) at United Nations Headquarters in New York, on multiple occasions.

a. July 2002 – the Applicant underwent surgery at Nairobi Hospital in Nairobi, Kenya to correct the deformity of his knee and foot caused by childhood polio.

b. February 2003 – the Applicant was evacuated to Johannesburg, South Africa for orthopedic consultation.

c. April 2005 – instead of an evacuation to Johannesburg, the Applicant opted for evacuation to New York after paying the difference in ticket cost and DSA. He was diagnosed with a nerve related problem.

d. July 2006 – the Applicant underwent surgery in Baltimore, USA, to correct the nerve defect to the muscles in his knee area. He returned to Ethiopia in September 2006.

e. May 2008 – the Applicant underwent a series of medical examinations in France. The attending orthopedic surgeon recommended the use of calipers with hip support and rehabilitation therapy since the previous surgeries had not resolved the issues. He also recommended workplace modifications to allow ease of mobility.

f. September 2008 – the Applicant underwent surgery to alleviate nerve pain at the International Modern Hospital, Dubai. He spent 38 days in Dubai.

- g. May 2009 – the Applicant went to the Bangkok Hospital Medical Centre for assessment and therapy on an out-patient basis. He declined the surgical procedure proposed by the doctors because an 85% success rate was not assured. He was there for 25 days.
 - h. September 2009 – the Applicant returned to the International Modern Hospital, Dubai, for another surgical procedure. He spent 33 days there.
 - i. May 2010 – the Applicant went to the Healthcare City California Chiropractic Centre in Dubai for post-surgery follow-up. He spent 33 days in Dubai.
 - j. September 2010 – the Applicant returned to the Healthcare City California Chiropractic Centre in Dubai for re-assessment. He stayed for 40 days.
 - k. March 2011 – the Applicant returned to the Healthcare City California Chiropractic Centre in Dubai for re-assessment. He stayed for 15 days.
 - l. September 2011 – the Applicant returned to the Healthcare City California Chiropractic Centre in Dubai for re-assessment. He stayed for 38 days.
 - m. January 2012 - the Applicant returned to the Healthcare City California Chiropractic Centre in Dubai for re-assessment. He stayed for 21 days.
 - n. June 2013 and October 2013 – the Applicant was evacuated to Aga Khan University Hospital in Nairobi for pain management. He stayed for 34 and 37 days, respectively.
12. At a meeting with the then Director of MSD in New York in January 2009, the Applicant complained about the discriminatory medical care he had been receiving and requested compensation for medical mismanagement and

reassignment to a duty station with good medical facilities, such as South Africa, Geneva or New York.

13. After the Applicant's September 2011, medical evacuation to Dubai, ECA refused his additional requests for evacuation until the current Director of MSD, Dr. Jillann Farmer, met him in Addis Ababa in June 2013. At the meeting, Dr. Farmer explained to him that under ST/AI/2000/10, medical evacuation was to be used only in cases of acute, life-threatening emergencies. She agreed that ECA would provide him with two additional medical evacuations on an exceptional basis.¹

14. The two additional medical evacuations took place in June and October 2013.

15. In response to the Applicant's further request for medical evacuation for pain management, Dr. Farmer wrote to the Applicant on 12 December 2013 as follows:

Dear [Applicant]

Re: Further request for medical evacuation for pain management

I have just received your most recent medical report from Dr. TS, at the Pain Management Unit, Aga Khan University Hospital Nairobi, Kenya.

I am indeed glad that this joint decision and effort have been beneficial to you. You have moved from 80% pain free in June 2013 to 0/10 on the Visual Analog Scale (VAS) in December, 2013. This improvement in your pain free level is now reflected in an overall improvement in your ability to function well according to the Physician's assessment.

At this juncture, I consider that we have worked as a team to put an end to your long-standing suffering. Although the specialist has requested for another follow-up in Nairobi in the coming six month, I am strongly convinced that your condition can now be managed locally.

As I explained to you when we met during my visit to Addis, the medical evacuation ST/AI should only be used in cases

¹ See Respondent's reply, annex 5.

of acute, life-threatening emergencies. I agreed to these 2 additional medevacs, as I was concerned that surgery had exacerbated your situation, and I did not wish to leave this unaddressed. At the time, I explained that only 2 more medevacs would be funded.

I am advised that Neurologists in Addis Ababa will be able to continue your management from here, but you retain the option of choosing to continue management at your own expense outside of Ethiopia. Should you choose to do so, you can organize it in collaboration with your insurance company, but it cannot any longer be handled as a case for medical evacuation.

[...]

16. The Applicant responded to Dr. Farmer on 14 December 2013 as follows: “I have agreed with your decision. Now I can move without any problem 100% free from my previous restless pain. In this regard I would like to thank the perfect decision you made. If the pain is come again [*sic*] I will go with my own expense as you stated on your attached MEMO [...].”²

17. On 14 July 2014, the Applicant wrote to the ECA Chief Medical Officer requesting medical evacuation. Her response of 15 July 2014 stated:

Thank you for the mail. Please be informed that all medical evacuations must obtain an approval from the UNMSD in New York. I also remember that at the end of the second medical evacuation, Dr. Farmer wrote to you stating clearly that that was the last medical evacuation abroad with regards to the treatment and in your response to her, you did agree that you were satisfied with the assistance given you and will be able to continue by yourself. I am not sure if there has been any change to that undertaking. In any case you know the procedure to process medical evacuation that the locally treating doctor writes a detail [*sic*] medical report justifying the evacuation and then this is sent to New York for review and advice according to each case. Without this information, I cannot contact New York with your case.

18. The Applicant raised similar requests for medical evacuation in 2015 and 2016, all of which were rejected by the ECA Chief Medical Officer.

² *Ibid*, annex 3.

19. On 18 October 2016, the Applicant filed an application to the Tribunal challenging several decisions, including, the denial of medical evacuation. This application was registered as Case No. UNDT/NBI/2016/077.

20. In a reply dated 21 November 2016, the Respondent asserted that the Applicant's challenge against the denial of medical evacuation was time-barred and therefore not receivable.

21. In December 2016, the Applicant once again raised a request for medical evacuation. It was denied by the ECA Chief Medical Officer on 12 January 2017.

22. On 29 January 2017, the Applicant submitted a request for management evaluation challenging the ECA Chief Medical Officer's negative decision of 12 January 2017.

23. On 16 March 2017, the Management Evaluation Unit ("MEU") informed that Applicant that his request for management evaluation was time-barred and accordingly not receivable.

THE APPLICABLE LAW

24. Staff rule 11.2 sets out the requirements for a request by a staff member for management evaluation. It states, in relevant part, that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

25. Article 8.1(c) of the UNDT Statute provides that an application shall be receivable by the Tribunal if “An applicant has previously submitted the contested administrative decision for management evaluation, where required [...].”

26. In *Kazazi* 2015-UNAT-557, the United Nations Appeals Tribunal (“UNAT”) held that:

[...] the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather the time starts to run from the date on which the original decision was made.⁶ For this reason, a staff member cannot reset the time for management review by asking for a confirmation of an administration decision that has been communicated to him earlier. Neither can a staff member unilaterally determine the date of an administrative decision.³

CONSIDERATIONS

27. The Tribunal does not consider it appropriate to grant the motion for combined proceedings because this claim concerns a discrete issue regarding receivability and no useful purpose would be served by consolidation with case No. UNDT/NBI/2016/077.

28. Insofar as the Applicant purported to request an Order from the Tribunal to enforce the terms of a mediation agreement it was incumbent upon him to produce such an agreement so that its terms could have been examined. Considering that no copy of the mediation agreement was enclosed with his application, the Tribunal, by Order No. 016 (NBI/2018), requested clarification of the claim and directed the Applicant to submit a copy of the agreement by 8 February 2018.

29. On 6 February 2018, the Applicant submitted: an interoffice memorandum dated 29 July 2010 from the ECA Director of Administration to managers in ECA regarding support for the Applicant; and an email dated 6 August 2010 written on behalf of the ECA Director of Administration to the Applicant regarding the appropriate venue for his next medical evacuation. None of these documents

³ See also: *Fiala* 2015-UNAT-516; *Thambiah* 2013-UNAT-385; *Cooke* 2012-UNAT-275; *Sethia* 2010-UNAT-079

evidenced a concluded agreement the terms of which the Applicant was seeking to enforce. Accordingly, the Tribunal's consideration of the issues will focus solely on his claim that he was denied medical evacuation.

30. It is clear that the impugned decision was the refusal to grant the Applicant further medical evacuation. That decision was first notified to the applicant on 15 July 2014. Subsequent requests for medical evacuation were also refused. The Appeals Tribunal has consistently ruled that subsequent reiterations of the same decision will not have the effect of resetting the clock and render an otherwise not receivable claim as being receivable.

31. Additionally, art. 8.3 of the UNDT Statute prohibits the Dispute Tribunal from suspending or waiving the deadlines for management evaluation. Accordingly, the Tribunal cannot entertain an application if the initial request for management evaluation is time-barred.⁴

JUDGMENT

The claim is not receivable and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 7th day of February 2018

Entered in the Register on this 7th day of February 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁴ See *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, and *Adjini et al.* 2011-UNAT-108.